Supreme Court, U.S.
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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MEAD CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF UNITED STATES ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL, CHAMBER OF COMMERCE OF THE UNITED STATES, AND UNITED STATES APPAREL INDUSTRY COUNCIL AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Court of International Trade is required to give controlling weight to a tariff classification ruling of the Customs Service under the standard enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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BRIEF OF UNITED STATES ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL, CHAMBER OF COMMERCE OF THE UNITED STATES, AND UNITED STATES APPAREL INDUSTRY COUNCIL AS AMICI CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the United States Association of Importers of Textiles and Apparel, the Chamber of Commerce of the United States, and the United States Apparel Industry Council, as *amici curiae* in support of respondent, with the written consent of the parties.[1]

[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity than *amici curiae* or their members made a monetary contribution to the preparation and submission of this brief.

INTEREST OF AMICI

Amici curiae are trade or business organizations, each with members who annually import millions of dollars worth of goods into the United States and who thus receive numerous classification rulings from the Customs Service each year. As representatives of these members, *amici* have a substantial interest in the standard of judicial deference applicable to those rulings in challenges in the Court of International Trade.

The United States Association of Importers of Textiles and Apparel ("USA-ITA") is a trade association with more than two hundred members involved in the textile and apparel business. USA-ITA's members include manufacturers, distributors, retailers, and related service providers, such as shipping lines and customs brokers.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country. The Chamber serves as the principal voice of the business community. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in this Court on issues of national concern to American business.

The United States Apparel Industry Council ("USAIC") is a national association which represents the interests of U.S.–based multinational apparel and textile firms. Its twenty-five member companies are deeply involved in the export and import of the entire range of textile and apparel products.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case of statutory interpretation. In issue is the level of deference, if any, the Court of International Trade ("CIT") is required to give to a "classification ruling" by the Customs Service specifying the appropriate classification for tariff purposes of a particular good to be imported. The United States contends that such rulings are to be given controlling weight in every case unless they are manifestly contrary to the tariff statute. That contention is wrong.

The United States errs because it treats resolution of this issue as governed solely by abstract principles of administrative law, including general principles of deference to administrative agency action. Resort to such default rules is inappropriate here because Congress has prescribed, by statute, the specific regime of judicial deference that applies in civil actions in the CIT challenging Customs Service classification rulings. Under that regime, the CIT is to review *de novo* the question whether the Service made an appropriate classification determination, which means that the court cannot give controlling weight to that determination. Instead, the court must reach its own independent legal determination as to the merits of the classification decision.

In *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999), this Court acknowledged the CIT's *de novo* review authority, but held that such authority was not inconsistent with deference to an interpretive regulation issued by the Service. Such regulations, the Court explained, serve only to define the underlying law that governs review of individual classification ruling, and the CIT can still review the classification decision itself *de novo*, *viz.*, by applying the facts to the underlying law (which includes the interpretive regulation to which it must defer). *Id.* at 1399.

This case is fundamentally different from *Haggar Apparel*. At issue here is the question of deference not to a

regulation establishing the law generally governing individual classification rulings, but to the *application* of that law to the facts of an individual case. That difference is dispositive. It is a logical impossibility for the CIT both to defer to a classification ruling and to review it *de novo* at the same time. Deference to the Service's classification rulings is, in other words, foreclosed by the same statutory structure cited in *Haggar Apparel* to justify deference to the Service's regulations. And that structure is the product of a long history of congressional refusal to confer discretion in respect to tariff classification rulings on the federal customs collector over the federal courts.

Nevertheless, to the extent individual classification rulings reflect long-held views of the Service, or are the result of carefully-reasoned judgment, the CIT may treat them as persuasive authority as to the correct classification. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Such a rule is not inconsistent with *de novo* review because the court does not give rulings controlling weight; instead the court simply accords them due respect in the process of reaching its own independent legal judgment as to their correctness. Deference in these terms is not generally applicable to all rulings, but rather depends on the nature of the particular ruling in issue. Because the ruling at issue here does not appear to satisfy the usual prerequisites for the respect due under *Skidmore*, the Federal Circuit did not err in giving the ruling no deference at all.

ARGUMENT

I. THE STATUTE GOVERNING REVIEW OF CUSTOMS SERVICE CLASSIFICATION RULINGS MAKES CLEAR THAT SUCH RULINGS ARE ENTITLED ONLY TO RESPECT AS PERSUASIVE AUTHORITY

A

It is common ground here that the question of how much a court should defer to the judgment of an administrative agency on a matter of statutory interpretation is ultimately one of congressional intent. *See* Brief for the United States ("U.S. Br.") at 27 n.13. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court explained that where there is ambiguity in a statute administered by a federal agency, courts are to presume that the congressional intent was to delegate to that agency the discretion to interpret the statute in whatever reasonable manner the agency considered appropriate. *Id.* at 843. In such cases, because Congress has effectively delegated interstitial lawmaking authority to the agency, courts must give the agency's interpretation of the statute "controlling weight" so long as it is not an unreasonable resolution of the statutory ambiguity. *Id.* at 844. As the Court put it in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996):

> We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

Id. at 740-41.

The presumption that Congress intends to vest interpretive responsibility in the agency, "rather than the courts," *id.*, is only that – a presumption. It is not irrebuttable. Even where a statutory ambiguity exists, the agency interpretation is not controlling in a subsequent judicial action if Congress has made clear its intention *not* to displace the usual authority of courts to interpret and apply the law. *See United States v. Haggar Apparel*, 119 S. Ct. 1392, 1399 (1999) (*Chevron*-type deference does not apply when Congress has "chosen to direct the court not to pay deference to the agency's views"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("[E]ven if AWPA's language establishing a private right of action is ambiguous, we need not defer to the Secretary of Labor's view of the scope of § 1854 because Congress has expressly established the judiciary and not the Department of Labor as the adjudicator of private rights of action under the statute."). *Chevron*-type deference does not apply, in other words, when Congress has "specified that in all suits involving interpretation or application of [a statute] the courts [a]re to give no deference to the agency's views, but [a]re to determine the issue de novo." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515-16.[2]

[2] Put another way, *Chevron*-type deference does not apply to agency rulings that "lack the force of law." *Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000); *see, e.g., Reno v. Koray*, 515 U.S. 50, 61 (1995); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-58 (1991); *Martin v. OSHRC*, 499 U.S. 144, 157 (1991). The conclusion follows because if the agency ruling does not carry the force of law, then the court necessarily remains the only arbiter of the law, and there is no basis for *Chevron* deference. As elaborated below, however, even when the agency ruling *does* carry the force of law, it does not necessarily follow that the court is wholly divested of independent interpretive authority. The *extent* to which a court retains interpretive authority, just as much as the question whether it retains interpretive authority at all, is a question of congressional intent.

B

There is also no dispute here that under the statute governing the procedures for challenging a classification ruling in the CIT, the court is required to determine the issue *de novo*. Because Congress thereby "has expressly established the judiciary and not the [Customs Service] as the adjudicator of [classification rulings] under the statute," *Adams Fruit*, 494 U.S. at 649, *Chevron*-type deference to the Service's classification rulings is improper.

1. In briefing before this Court in *United States v. Haggar Apparel*, the most recent case addressing the degree of deference owed to a Customs Service decision, the United States explicitly conceded that challenges to classification rulings in the CIT involve trials *de novo*. *See* U.S. Reply Br., No. 97-2044, at 3, 4. The United States has not addressed the question here, but its earlier concession follows as a matter of course from the statutory text and structure.

Section 2640 of U.S. Code Title 28 sets forth the "Scope and standard of review" applicable in classification ruling challenges before the CIT. The statute prescribes that in all "[c]ivil actions contesting the denial of a protest [to a classification ruling]," the CIT "shall makes its determination upon the basis of *the record made before the court*," 28 U.S.C. § 2640(a)(1) (emphasis added) – not the record made before the Customs Service, as in other kinds of CIT proceedings, *see, e.g., id.* § 2640(d), (e). The statute also specifically allows an importer in a classification ruling case to raise before the CIT "any new ground" for challenging the ruling, even grounds not previously urged by the importer or considered by the Customs Service. 28 U.S.C. § 2638. If there is any doubt at all that these statutory provisions on

their face evidence Congress's intent to vest the CIT with the power of *de novo* review over Customs Service classification rulings, the legislative history unambiguously confirms that intent. *See* S. Rep. No. 96-466, at 18-19 (1979) ("[p]roposed section 2640(a)(1) provides for a trial de novo" in classification ruling suits); H.R. Rep. No. 96-1235, at 44 (1980) ("the bill preserves the right to a trial de novo for the review of a denial of a protest").

2. The fact that CIT review of classification rulings is *de novo* conclusively refutes any possibility that the CIT's review is bound by *Chevron*-type deference. By definition, *de novo* review of a legal issue such as a classification ruling is not deferential review of that issue. When Congress requires the court to apply a *de novo* standard in reviewing an individual agency action, it means that Congress intends for the court – and not the agency – to possess ultimate discretionary authority to apply the statute in the particular circumstance. *See, e.g., United States v. First City Nat'l Bank*, 386 U.S. 361, 368-69 (1967) (phrase in Bank Merger Act requiring court to "review *de novo* the issues presented" means "that the court should make an independent determination of the issues," and that it is "the court's judgment, not the [agency's], that finally determines whether the merger is legal"). As then-Judge Ginsburg put it for the en banc D.C. Circuit:

> *De novo* means here, as it ordinarily does, a fresh, independent determination of 'the matter' at stake; the court's inquiry is not limited to or constricted by the administrative record, nor is any deference due the agency's conclusion . . . . Essentially, then, the district court's charge was to put itself in the agency's place.

Doe v. United States, 821 F.2d 694, 697-98 (D.C. Cir. 1987) (en banc); *see also Aronson v. IRS*, 973 F.2d 962, 965-67 (1st Cir. 1992) (Breyer, C.J.) (contrasting *de novo* review with *Chevron* deference).

The "matter at stake" in a proceeding challenging a Customs classification ruling is, of course, the proper classification of the good in question. Under the regime established by Congress, the Customs Service makes an *initial* determination in respect to the classification of the good, which is a "binding ruling" under the statute. 19 U.S.C. § 1502(a). It is only "binding," however, to the extent it is not reviewed and rejected by the CIT. If the ruling is challenged by the importer whom the ruling binds, the CIT's power of *de novo* review necessarily means that CIT must reach its own independent determination of the proper classification. As the United States itself conceded in *Haggar Apparel*, because "proceedings in the [CIT] on customs protests" are *de novo* proceedings, they are "unlike judicial review of the actions of other agencies in that any 'record' made in the Service, including the reasons for its assessment, is irrelevant." U.S. Reply Br., No. 97-2044, at 3 n.2 (internal quotation marks omitted). Inasmuch as the record and reasons for the Customs classification ruling are by statute "irrelevant" in a subsequent CIT challenge, the CIT cannot possibly defer to that ruling.

The United States seeks to avoid the force of its *Haggar Apparel* concession by focusing on an irrelevancy. The United States argues that the deference is required simply because the Service's initial ruling has the "binding" force of law, *see* U.S. Br. at 30, which, says the United States, automatically entitles the ruling to controlling weight under usual administrative law deference principles. Classification rulings may or may not have the force of law, *cf.* Pet. App. at 6a (decision below, holding that they do not); Brief Amicus Curiae of Professor Thomas Merrill at 26-30 (same), but that question is beside the point.

As just discussed, the investiture of authority in the agency to issue a legally binding decision does not necessarily mean that Congress intended to deprive a reviewing court of *its* authority to interpret and apply the law.[3] The question is not simply whether Congress intended to give the agency the authority to reach an initial "binding" legal conclusion. The question is, rather, whether Congress intended to "specifically designate[]" the agency as "the primary source for interpretation and application of the . . . law." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). *Chevron* deference is ordinarily justified, in other words, because of the presumption that the delegation of lawmaking authority to the agency reveals "a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Id.* at 568. But, as we have seen, that preference is *only presumed*; it does not apply where the statute reveals that Congress in fact intended to preserve the authority of courts to reach independent legal conclusions. *See supra* at 6.

Here, it is evident from the statutory structure that Congress's "decided preference" for the final resolution of tariff classification issues was not by "uniform administrative decision" but by uniform *judicial* decision: Congress created a single Court of International Trade, with the exclusive authority to review individual tariff classification rulings *de novo* and reach an independent judgment as to the proper

[3] For the same reason, the government's rather inscrutable assertion that *Chevron* deference applies here simply because the rulings were "issued in the format that Congress authorized for this specific purpose," U.S. Br. at 31, is also incorrect. Regardless of the "format" Congress envisioned for the issuance of interpretive rulings, the dispositive fact is that the statute explicitly grants the CIT the authority to reach its own judgment on classification determinations.

classification.[4] Accordingly, the presumption that underlies and justifies *Chevron* deference is inapplicable.

3. This Court's decision in *Haggar Apparel* confirms all of this by necessary implication. The Court held in that case that, despite the existence of the *de novo* review requirement in judicial challenges to classification rulings, the CIT is nevertheless bound to give *Chevron*-type deference to an interpretive *regulation* issued by the Customs Service establishing some of the ground rules for classification determinations. While the Court in *Haggar Apparel* found no inconsistency between the deference to the Customs Service's interpretation of the underlying law and the CIT's broad power of *de novo* review, that view was predicated on the assumption that the CIT *would* have power to review *de novo* the application of the facts to the underlying law.

In rejecting the claim that *de novo* review necessarily entailed the authority to make an independent determination as to *all* questions of law, the Court explained that "[*d*]*e novo* proceedings presume a foundation of law." *Haggar Apparel*, 119 S. Ct. at 1399. Because regulations issued by an agency simply "establish legal norms," it follows that "[d]eference can be given to the regulations without impairing the author-

[4] The United States argues for *Chevron*-type deference here on the instructive rationale that such deference "preserves uniformity in federal law by providing for national determinations made by the administering agency rather than potentially splintering effect of regional determinations made by lower federal courts." U.S. Br. at 26 n.11 (internal quotation marks omitted). The United States is of course correct that such a rationale explains *Chevron*-type deference generally, but the government's own argument proves why such deference is improper and unnecessary here: there can be no "splintering effect" on classification issues because there are no "regional determinations of lower federal courts"; there are *only* "national determinations" made by the one court with reviewing authority, the CIT.

ity of the court to make factual determinations, and to apply those determinations to the law, *de novo*." *Id.*

By contrast, it is not possible to give deference to a classification ruling "without impairing the authority of the court . . . to apply [factual determinations] to the law, *de novo*." A classification ruling is nothing but an application of facts – i.e., a description of the good – to the law – i.e., the statute and regulations defining the tariff classifications. What results is a legal conclusion regarding the proper tariff classification for the good, and the statute explicitly confers on the CIT the power to review the Customs Service's conclusion on that issue *de novo*. *See supra* at 7-8.[5] It strains logic beyond the snapping point to say that the CIT is required to give "controlling" weight to the very legal conclusion it is supposed to be reviewing *de novo*.[6] The CIT simply cannot

[5] When the Court in *Haggar Apparel* noted that it found no "directive" in the statute "not to pay deference to the agency's views," 119 S. Ct. at 1399, the Court was referring to the fact that there was no directive not to pay deference to interpretive regulations. The *de novo* requirement was not tantamount to such a directive, the Court explained, because the CIT could still apply *de novo* review while deferring to the interpretation in the agency's regulation. *Id.* By contrast, as we explain in the text, it cannot both review a classification ruling *de novo* and defer to that ruling at the same time.

[6] It would be no answer to suggest that *de novo* review in this context must be limited only to factfinding. First, that limitation would be inconsistent with the importer's right to bring up new issues on review. *See supra* at 7. Second, so far as we can tell, such a constricted application of *de novo* review would be unique in the law. *See supra* at 8-9. Third, this Court itself in *Haggar Apparel* did not comprehend such a circumscribed meaning. *See* 119 S. Ct. at 1399 (noting that *de novo* review includes application of facts to law). Fourth, and finally, it is the experience of *amici*'s members that classification matters almost never involve disputed

apply *de novo* review to a classification ruling at the same time that it gives deference to that selfsame ruling. It follows that the result in this case in respect to such deference must be different from the result in *Haggar Apparel*.

By reserving to the CIT the power of *de novo* review, it is fair to say that Congress evidenced its intention to confer on that court somewhat more authority than is usual to review (and second-guess) administrative-type determinations such as tariff classification rulings. *See* U.S. Reply Br., *United States v. Haggar Apparel, Inc.*, No. 97-2044, at 3 n.2 (judicial review of customs protests "are unlike judicial review of the action of other agencies" (internal quotation marks omitted)). But it not absurd that Congress would do so, nor is it even especially strange. As noted above, the usual concerns about piecemeal litigation over certain matters of legal application are not present; uniformity is ensured because a single court of review exists for all classification determinations. *See supra* at 10-11 & note 4. And as elaborated below in Part II, the unique history of customs determinations well explains why in fact Congress saw fit to depart from the administrative law norm in structuring the relationship between the Customs Service and the judiciary. What matters most of all, however, is that Congress did de-

factual issues; the vast majority are decided on the basis of an undisputed factual record (*e.g.*, a sample or description of the precise good in question) and cross-motions for summary judgment on the correct legal classification. *See, e.g., Avenues in Leather, Inc. v. United States*, 178 F.3d 1241 (Fed. Cir. 1999); *Trans-Border Customs Service, Inc. v. United States*, 76 F.3d 354 (Fed. Cir. 1996). If such classification rulings are entitled to controlling weight, in almost every classification challenge there will be nothing for the CIT to review *de novo* at all. It is hard to imagine why Congress would have gone out of its way to establish by statute a special category of plenary agency review that is almost never to be invoked.

part from that norm, explicitly investing in the CIT (rather than the Customs Service) final, legal discretion in respect to classification rulings. In view of the allocation of that discretion, *Chevron*-type deference is inappropriate.

C

1. The fact that the CIT retains the power to review a given classification ruling *de novo*, and thus that the court need not accord the ruling *Chevron*-type deference, does not mean that the CIT should give the views of the Customs Service no respect at all. Indeed, the CIT's governing statute establishes a "presumption of correctness" in favor of the Service's ruling. 28 U.S.C. § 2639(a)(1). In point of fact, however, that provision means only that the burden is on the importer to establish that the Service's ruling is incorrect. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 876-78 (Fed. Cir. 1984). As to whether the importer carried that burden, the court retains the plenary review authority conferred by the statute.

Of greater significance than § 2639(a)(1) is the decision of this Court in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), issued after the decision of the Federal Circuit in this case. In *Christensen*, a majority of this Court confirmed that even where *Chevron* deference to an agency's legal interpretation is inappropriate because the agency action in issue "lack[s] the force of law," 120 S. Ct. at 1662 – thus leaving discretionary legal authority over the matter in the hands of the court and not the agency, *see supra* note 2 – the agency's interpretation may still be "'entitled to respect'" purely for its persuasive authority. *Id.* at 1663 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Under the "*Skidmore* deference" acknowledged by eight Justices in *Christensen*, the views of a specialized agency "may possess the 'power to persuade,' even where they lack the 'power to control.'" *Id.* at 1667 (Breyer, J., dissenting); *see id.* at 1668 (agreeing

with majority that *Skidmore* deference "retains legal vitality" in circumstances in which *Chevron* may be inapplicable); *id.* at 1667 n.2 (Stevens, J., dissenting) ("I fully agree with agree with Justice Breyer's comments on *Chevron*"). Thus, depending on such factors as the quality of its reasoning and the length of the Service's adherence to it in other like cases – both relevant factors under *Skidmore*-type deference, *see* 323 U.S. at 140 – a given classification ruling may be "entitled to respect" from the CIT as persuasive authority on how a given set of facts ought to be applied to the law.

2. It is important to make clear that the kind of respect for agency interpretations contemplated by what is called "*Skidmore* deference" is in no way inconsistent with the authority of the CIT to engage in *de novo* review of classification rulings. Put differently, *Skidmore* "deference" does not divest the court of its responsibility to reach its own independent judgment as to the proper classification.

This Court's opinion in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), is instructive. The Court held in that case that a federal court of appeals is required by the principles of *Erie RR v. Tompkins* to apply *de novo* review to the state-law determinations of a federal district court sitting in diversity, even though a district court might have greater familiarity or experience with the law of the state in which it sits. *Id.* at 231-39. In so holding, however, the Court was careful to point out that a well-reasoned district court decision naturally would still be of significant value to the reviewing court:

> Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will actually consider this analysis in undertaking its review. . . . Any expertise possessed by the district court will inform the structure and

> content of its conclusions of law and thereby become evident to the reviewing court. If the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion.

Id. at 232-33.

Those principles capture perfectly the application of *Skidmore*-type deference as it applies to the CIT's review of Customs Service classification rulings. While the CIT's *de novo* review authority requires the court to reach its own independent conclusion as to a particular classification, the court still may give respect to the presumably greater experience of the Customs Service in making classification decisions. To the extent that experience is reflected in well-reasoned legal classification rulings or rulings that withstand the force of time, *Skidmore*-type deference simply means the CIT can and should give due respect to the persuasive force of those rulings.

3. For those reasons, the government's heavy reliance on *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), is misplaced. In *Zenith Radio*, this Court, applying a form of *Skidmore* deference, elected to defer to a Customs Service ruling in a countervailing duty case that applied an interpretive position adopted in 1898 and "uniformly maintained" by the agency ever since. *Id.* at 450. "This longstanding and consistent interpretation," the Court explained, "is entitled to considerable weight." *Id.*

Contrary to the United States' suggestion, *Zenith Radio* does not stand for the proposition that *all* Customs classification rulings are entitled to the kind of near-conclusive deference given under *Chevron*. *Zenith Radio* was obviously decided *before Chevron*, which was a "watershed" decision, *Christensen*, 120 S. Ct. at 1664 (Scalia, J., concurring), one

that at a minimum established an entirely new kind of judicial deference to agency legal interpretations, *id.* at 1664; *id.* at 1662-63 (maj. op.) (also distinguishing between *Chevron* and *Skidmore* deference). While the government nevertheless insists that *Zenith Radio* was a "direct precursor" to *Chevron*, if *Zenith Radio* were in fact a "pre-*Chevron*" *Chevron*-type case and not a *Skidmore*-type case, the Court would not have found it necessary to expound upon the interpretation's impressive pedigree. The existence of *Chevron* deference *vel non* turns exclusively on whether or not the statute evidences a congressional intent to delegate to the agency exclusive power to issue binding interpretations of law; if so, the court must defer to a reasonable interpretation; if not, *Chevron*-type deference is unwarranted. *See Christensen*, 120 S. Ct. at 1662. The venerability and consistency of an agency interpretation, while fundamental to *Zenith Radio*, have no place in a *Chevron* analysis – they are considerations unique to the *Skidmore* form of deference.

Thus, *Zenith Radio* at the very most represents a case in which this Court gave substantial deference to a ruling that reflected interpretations held by the Service consistently over a period of many decades. That is just what *Skidmore* requires. *Zenith Radio* necessarily says nothing about how much the CIT ought to defer to rulings that are not so deeply rooted, or lack the quality of reasoning to be expected in a deliberative judgment.

4. As *amici*, we have no view as to the correctness of the particular classification ruling at issue in this case, when examined on its own terms. The point here is that the Federal Circuit was at least correct to examine the ruling on its own terms. The ruling does not appear to be entitled to *Skidmore/Zenith Radio* "respect" as a long-held and consistent agency interpretation, *see* Resp. Br. In Opp. To Cert. at 3 (describing recent issuance of ruling and changes in interpretation), and it is perfectly clear that the ruling is not enti-

tled to *Chevron*-style deference, *see supra* at 8-14. The Federal Circuit thus did not err in according no deference at all to the classification ruling in this case.

II. THE MODERN STATUTORY STRUCTURE OF NONDEFERENTIAL JUDICIAL REVIEW IS CONSISTENT WITH THE HISTORIC ROLE OF THE JUDICIARY IN THE RESOLUTION OF TARIFF CLASSIFICATION DISPUTES

The previous section established that the plain text and structure of the modern statutes governing the adjudication of customs classification disputes evidences Congress's intent to vest courts with broader authority than is normally "presumed" by canons of construction like *Chevron*. In this section we explain why the CIT's authority is relatively unique: the modern structure affording CIT *de novo* review of classification rulings – and thus denying the Customs Service deference to those rulings – is an outgrowth of a long history of congressional refusal to subject importers to the discretion of the customs collector in making tariff classification decisions.

A

From the first days of the Republic importers enjoyed the right to challenge the classification of goods by a customs official by instituting a civil jury trial in which all questions of fact and law were adjudged *de novo*. The second statute that Congress passed, the Act of July 4, 1789, ch. 2, 1 Stat. 24, set forth a tariff schedule and imposed duties on imported goods. The customs official collected duties, which were required to be paid; if the importer objected to an assessment, his recourse was a common law right of action against the collector personally "to recover back an excess of duties paid to him as collector" in light of an erroneous classification. *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137, 158 (1836).

This exposure to personal liability led most collectors to hoard, and some to embezzle, contested duties. Congress responded by a 1839 statute requiring that collectors pay disputed sums to the United States Treasury, and requiring the Secretary of the Treasury to refund any duties later found to have been erroneously collected. Act of March 3, 1839, ch. 82, § 2, 5 Stat. 339, 348-49. In *Cary v. Curtis*, 44 U.S. (3 How.) 236, 239-52 (1845), this Court held that the 1839 statute eliminated the common law right of action against the collector, and that the power to resolve customs disputes rested exclusively with the Secretary of the Treasury.

In dissent, Justice Story argued that the Court's construction of the Act eliminated the importer's right to *de novo* judicial review of tariff classification decisions that traditionally had been critical to the resolution of classification controversies:

> [G]rave controversies must always exist (as they have always hitherto existed) as to the category within which particular fabrics and articles are to be classed. The line of discrimination between fabrics and articles approaching near to each other in quality, or component materials, or commercial denominations, is often very nice and difficult, and sometimes exceedingly obscure. It is the very case, therefore, which is fit for judicial inquiry and decision. . . .
>
> Besides, we all know that, in all revenue cases, it is the constant practice of the secretary of the Treasury to give written instructions to the various collectors of the customs as to what duties are to be collected under particular revenue laws, and what, in his judgment, is the proper interpretation of those laws. . . . Of what use then, practically speaking, is the appeal to him, since he has already given his decision? Further, it is well known, and the annals of

> this court as well as those of the other courts of the United States establish in the fullest manner, that the interpretations so given by the secretary of the Treasury have, in many instances, differed widely from those of the courts. The Constitution looks to the courts as the final interpreters of the laws.

44 U.S. (3 How.) at 256-57 (Story, J., dissenting).

Just over a month after *Cary* was decided, Congress enacted the Act of February 26, 1845, ch. 22, 5 Stat. 727, effectively overruling *Cary* and restoring *de novo* judicial review by establishing a statutory right to a trial by jury against the collector. *See* Brown, *The United States Customs Court I*, 19 ABA J. 333, 336 (June 1933). Not long thereafter, this Court confirmed that the statute had restored the supremacy of the judicial role vis-à-vis Customs rulings:

> The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court, but it is the laws which are to govern, rather then their opinion of them, and importers, in cases of doubt, are entitled to have their rights settled by the judicial exposition of those laws, rather than by the views of the Department. And though, as between the customhouse officers and the Department, the latter must by law control the course of proceeding, yet, as between them and the importer, it is well settled, that the legality of all their doings may be revised in judicial tribunals.

Greely v. Thompson, 51 U.S. 225, 234 (1850) (citations omitted).

B

By the 1880s, the volume and complexity of customs litigation had overwhelmed the ability of the courts to handle the caseload efficiently and effectively, and lack of uniformity in decisions was of serious concern. Congress responded by creating specialized trial and appellate courts specifically to handle Customs cases. *See generally United States v. Stone & Downer Co.*, 274 U.S. 225, 232-34 (1927).

The first new entity was a special Board of General Appraisers created to hear appeals from decisions of customs officials, with an appeal to federal circuit courts. Act of June 10, 1890, Ch. 407, 26 Stat. 131. In response to strong objections concerning the abolition of the right to a jury trial, the Act expressly provided for "a review of the questions of law and fact" by the federal court, and further permitted the introduction of new evidence before the reviewing court. *Id.* § 15. Construing that statute, this Court held that "a party dissatisfied with the classification of imports may apply to the court to have examined and reviewed everything involving the legality of the [collector's] demand." *Erhardt v. Schroeder*, 155 U.S. 124, 129 (1894); *see also Merritt v. Walsh*, 104 U.S. 694, 700 (1891) ("Discretion in the customs-house officer should be limited as strictly as possible.").

The next entity was a specialized appellate court, the Court of Customs Appeals, with exclusive jurisdiction to hear appeals from the Board. Act of August 5, 1909, ch. 6, § 29, 36 Stat. 11, 105-6. In 1926 Congress renamed the Board the United States Customs Court. Act of May 28, 1926, ch. 411, 44 Stat. 669, 669. The Customs Court reviewed all classification cases *de novo*. *See, e.g.*, Tariff Act of 1922, § 514, ch. 356, 42 Stat. 858, 969 (importer may challenge "[a]ll decisions of the collector, including the legality of all orders and findings entering into the same"); *C.J. Tower & Sons v. United States*, 33 Cust. Ct. 14, 15 (Cust. Ct. 1954)

("[t]he courts are not influenced by the interpretative rulings made for the guidance of customs officers" in "the construction of the tariff laws"). Congress later conferred Article III status on both courts. *See Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

In 1970, with the United States Customs Court again facing a "rapidly expanding workload," S. Rep. No. 91-576, at 7 (1969), Congress enacted the Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274. Among other things, this Act continued to give the Customs Courts exclusive jurisdiction over "the legality of all orders and findings entering into" a classification dispute, 28 U.S.C. § 1582(a) (1970), and permitted the Customs Court to consider "any new ground" in a civil action challenging a tariff classification. *Id.* § 2632(d); *see* S. Rep. No. 91-576, at 18 (1969).

C

Building on the unbroken tradition of *de novo* judicial review of tariff classification decisions dating back to the beginning of the Republic, Congress established the current regime for the adjudication of classification disputes in the Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727. That act instituted "a comprehensive system of judicial review of civil actions arising from import transactions" that "clarified and expanded [the] jurisdiction" of the Customs Court, H.R. Rep. No. 96-1235, at 20 (1980), and changed its name to the Court of International Trade, Pub. L. No. 96-417 § 192(a), 94 Stat. at 1729. In hearings on the Customs Courts Act, the Department of Justice – the principal drafter and supporter of the bill – explained that under the prior law "civil action challenges" to "a decision by the Customs Service" were tested "in a trial de novo," and added that "[w]e strongly believe that this current method of obtaining judicial review ought to be maintained." Hearing on S. 1654 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 96th Cong. 15 (1979) (statement of David M. Cohen, Director, Commercial Litigation Branch, Department of Justice). The Department further declared that "trial de novo is the most sweeping form of judicial review available" and that it was not the Department's intent in drafting the bill "to change that principle at all." Hearing on S. 2857 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong. 62 (1978) (statement of David M. Cohen, Chief, Customs Section, Department of Justice).

* * * *

The history reported here reveals the unusual depth and consistency of Congress's commitment to ensuring that primary discretionary authority over tariff classification decisions remains in the hands of the judiciary and not the with customs collector.[7] The standard of highly deferential review of tariff classification rulings by the Customs Service urged by the United States in this case not only contradicts, but offends, that commitment. In view of the congressional design evidenced in the statutory structure adopted in the Customs Court Act of 1980, and the tradition on which that Act was founded, this Court should hold that Customs Service tariff classification rulings are not entitled to deference in any respect other than as persuasive authority.

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[7] The Court's conclusion in *Haggar Apparel* that this history is not relevant to the question of deference to a Customs *regulation*, *see* 119 S. Ct. at 1400, does not deny its relevance to the question of deference a Customs *ruling*, which has been Congress's central concern from the outset. *See also supra* at 11-13 & note 5.

CONCLUSION

For the foregoing reasons, this Court should hold that the CIT is not required to accord Customs classification rulings controlling weight under the standard enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Respectfully submitted,

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